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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

COOTER & GELL,
Petitioner,

v.

HARTMARX CORPORATION, *et. al.*,
Respondents.

BRIEF *AMICUS CURIAE* OF PUBLIC CITIZEN URGING REVERSAL

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INTERESTS OF *AMICUS*

Public Citizen, through the ten lawyers in its Litigation Group, regularly litigates in the federal courts, sometimes on its own behalf, but often on behalf of individuals and other organizations, generally on the plaintiff's side. Public Citizen is filing this brief because of its concern that Rule 11 of the Federal Rules of Civil Procedure has been applied in this case and elsewhere in a manner that threatens to chill important litigation in the federal courts. Although neither Public Citizen nor its clients have been subjected to this type of misuse of Rule 11, other groups who share Public

Citizen's goals and who seek to use the federal courts to promote justice have been adversely affected by rulings in cases similar to this one. In addition, Public Citizen's attorneys have been asked with increasing frequency to represent members of the Bar, individual clients, and nonprofit organizations that have been sanctioned under Rule 11.

This brief is filed with the consent of the parties and in coordination with the brief of the petitioner. It attempts not to duplicate the arguments made therein but to offer a different perspective. It also seeks to flesh out for the Court the ramifications that this case will have on other litigation, by suggesting additional considerations that bear on the outcome of the three questions presented.

STATEMENT OF THE CASE

After this antitrust action was filed by petitioner on behalf of the plaintiff Danik Inc., the defendants/respondents moved to dismiss under Rule 12 of the Federal Rules of Civil Procedure. Shortly thereafter, they filed a motion for sanctions against Danik and petitioner — the law firm which employs the lawyers who signed the pleadings — alleging that the complaint was made without reasonable factual inquiry, as required by Rule 11 of the Federal Rules of Civil Procedure. Respondents then moved to take the deposition of Danik's principal owner, John Dashtara, and despite the pendency of respondents' own motions to dismiss under Rule 12 and for sanctions under Rule 11, the district court refused to quash the notice. Therefore, after answering both motions, Danik had to subject its principal owner to a deposition, including inquiries into attorney-client matters relating to the pre-complaint investigation,

even though there had not yet been a ruling on the merits of respondents' supposedly dispositive motion to dismiss.

With the case in this posture, Danik filed a notice under Rule 41(a)(1) of the Federal Rules of Civil Procedure, dismissing the case without prejudice, as it had an absolute right to do without the consent of respondents, and without any conditions of the kind applicable to dismissals under Rule 41(a)(2). Nonetheless, respondents insisted that the dismissal applied only to the merits and not to the pending Rule 11 motion, and urged the district court to impose sanctions against petitioner. Nearly four years later, the court decided to impose sanctions and ordered the submissions of affidavits as to the amount of attorneys' fees to be awarded. It subsequently entered an order awarding fees in excess of $30,000, two-thirds of it against petitioner, and one-third against Danik.

Both petitioner and Danik appealed, and the Court of Appeals for the District of Columbia Circuit affirmed the judgment against petitioner, after Danik's appeal was dismissed when Danik went into bankruptcy. First, the court ruled that the filing of a voluntary notice of dismissal did not deprive the district court of the power to issue sanctions, and then it upheld the award, ruling that the imposition of attorneys' fees in this case was not an abuse of discretion. In addition, it held that respondents had an automatic right to attorneys' fees for their successful defense of the imposition of sanctions, and it remanded the case to the district court for a determination as to the proper amount of attorneys' fees for the appeal.

On October 16, 1989, this Court granted the writ of certiorari, limiting its review to questions relating to the effect of the Rule 41(a)(1) dismissal, the standard of review on appeal, and the issue of fees for defending the sanctions ruling on appeal. However, two weeks prior to the granting

of review, this Court heard argument in *Pavelic & Le Flore v. Marvel Entertainment Group*, No. 88-791, which presents the question of whether a law partnership, of which the attorney who signed a pleading was a member, may be held liable for sanctions under Rule 11, along with the individual attorney. If this Court holds in *Pavelic & Le Flore* that Rule 11 does not apply to the law firm, reversal here would be mandated because respondents' motion for sanctions was filed only against the law firm and the client, the judgment was entered only against the law firm and the client, and no appeal was taken by respondents from that judgment. Admittedly, petitioner did not present the *Pavelic* issue to this Court or to the court of appeals. Nonetheless, reversal on that ground would still be required since, under Rule 11 as so construed, the district court would have lacked the power to award sanctions against petitioner, and so long as the judgment has not become final, such plain error should be corrected by this Court. But regardless of the result in *Pavelic*, reversal is required here for the reasons set forth below.

SUMMARY OF ARGUMENT

1. The district court should never have reached the merits of the Rule 11 motion because the filing of a Rule 41(a)(1) dismissal deprived the court of power to pass on that motion. This reading of Rule 41(a)(1) is confirmed by the text of the Rule itself, which contains specific exceptions that do not include motions under Rules 11 and 12, and it also promotes the policy of encouraging plaintiffs to dismiss cases that they no longer wish to continue. The fact that a Rule 11 motion was pending when the dismissal occurred should have no relevance because, if it did, it would encourage the automatic, early filing of such motions.

That practice is undesirable because it would burden the courts and the litigants with sometimes unnecessary and almost always divisive motions. It would also create an immediate potential conflict of interest between attorney and client because of the divergent interests that they have with respect to the outcome of the substantive and sanctions motions. Finally, in most cases it would create a conflict with regard to the proper response to the sanctions motion because the client's best defense is often to blame the lawyer for any errors.

2. A three-tier scope of review is necessary for sanctions appeals: a clearly erroneous standard for factual determinations, *de novo* review for the legal question of whether the conduct at issue violates the Rule, and an abuse of discretion standard for the choice of sanctions if a violation is found. Only in this way can the appellate courts assure that the standards of Rule 11 are followed and that trial courts neither utilize an excessively harsh standard, nor refuse to impose any sanctions at all when the requisite reasonable inquiry has not been made.

3. There is no basis in any statute or Rule for awarding respondents fees for defending the sanctions award in the court of appeals. Indeed, the only Rule that bears directly on this question — Rule 38 of the Federal Rules of Appellate Procedure — allows fees on appeal, but *only* if the appeal is found to be frivolous, which the court did not find, and could not have found here. Moreover, there is no principled basis for awarding fees to the winner on appeal in a sanctions case only for defending an award made below, and hence the rationale offered by the court of appeals would create a general fee-shifting rule for all sanctions cases. Indeed, the assertion by the court of appeals —that fees were needed to protect the full benefit of the award made below — would apply to every defense of a favorable

judgment and thereby alter the basic American Rule and entitle the winner in the court of appeals to attorneys' fees in every case. Plainly, the courts have no such power on their own to alter the American Rule, and nothing in any Rule or statute purports to give that power to them.

ARGUMENT

THE JUDGMENT OF THE COURT OF APPEALS SHOULD BE REVERSED.

A. *The Effect of a Rule 41(a)(1) Dismissal*

On its face, Rule 41(a)(1) gives a plaintiff an absolute right to obtain dismissal with no conditions attached, if the notice is filed before an answer or motion for summary judgment is filed, unlike under Rule 41(a)(2) where the court may allow dismissal on "such terms and conditions as the court deems proper." Moreover, the inclusion in Rule 41(a)(1) of explicit exceptions for Rules 23(e) and 66, as well as for any applicable statutes, underscores the plain reading of Rule 41(a)(1) that it does not permit an exception for Rule 11 motions. In this regard, we note that the exception for statutes, which is probably necessary under the Rules Enabling Act, would permit the court to impose sanctions under provisions such as 28 U.S.C. § 1927, if the strict terms of that provision were found applicable. Similarly, if attorneys' fees were available to a prevailing defendant under 42 U.S.C. § 1988 or some other provision — but not under the antitrust laws which were at issue here, *see* 15 U.S.C. § 15(a) (fees only for plaintiffs, not prevailing parties) — those, too, would not be

precluded.[1] Thus, we do not argue that the district court lacked "jurisdiction" to decide the Rule 11 motion after dismissal; rather we argue only that the plain meaning of Rule 41(a)(1) does not allow Rule 11 sanctions motions to go forward.

A strict application of Rule 41(a)(1) is entirely appropriate. It is one of the few rules which allows an action taken by one party, here the plaintiff, to be determinative without any role for the other side. That does not mean, however, that a defendant who *is* concerned about the preclusive effect of Rule 41(a)(1) is left without recourse since the filing of an answer or the making of a motion for summary judgment would preserve any right to move under Rule 11. Of course, that protection does not assist respondents here since they only moved for dismissal under Rule 12. Because the drafters of Rule 41(a)(1) plainly decided to treat motions to dismiss and motions for summary judgment quite differently in allowing Rule 41(a)(1) dismissals, the courts are bound by that choice. Finally, there is a sound policy reason to allow plaintiffs to avoid Rule 11 motions through voluntary dismissals: it will encourage them to dismiss lawsuits at the earliest stage if they determine that they have no merit or for any other reason. Rule 41 (a)(1) draws a clear line, and it should be followed here.[2]

We recognize that, before the Rule 41(a)(1) notice of dismissal was filed here, respondents had filed a motion to

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[1] There is no problem of timeliness if attorneys fees are not requested until after a final judgment is entered. *See White v. New Hampshire*, 455 U.S. 445 (1982).

[2] Unlike a Rule 12 motion to dismiss, a motion for summary judgment does not relieve a defendant of filing an answer within the time required by Rule 12(a).

dismiss under Rule 12 and a sanctions motions under Rule 11. While we believe that the filing of the Rule 12 motion has no effect under Rule 41(a)(1), we recognize that there are arguments to the contrary. We write here principally to urge the Court that, whatever the relevance of the Rule 12 motion may be, this Court should not attach any significance to the fact that a Rule 11 motion was filed before plaintiff dismissed the case. Moreover, as we now demonstrate, there are several important reasons why the Court should disregard the filing of the Rule 11 motion in passing on the effect of the filing of the notice under Rule 41(a)(1).

First, giving any weight to the pendency of a Rule 11 motion would only encourage the early filing of such motions, and there are more than enough Rule 11 motions filed in the federal courts, whatever their merits may be. *See* G. Joseph, *Sanctions: The Federal Law of Litigation Abuse* (Michie Press 1989) (book of almost 700 pages, nearly half devoted to Rule 11 alone). The immediate effect of the filing of a Rule 11 motion is to raise both the stakes in the lawsuit and the level of hostility, thus making compromise less likely. That, in turn, increases the burdens on the courts that must not only decide the merits, but rule on often complex legal and factual issues raised under Rule 11. *See Advisory Committee Notes to 1983 Amendments to Federal Rules of Civil Procedure*, 97 F.R.D. 165, 201 (1982), expressing concern about "the cost of satellite litigation over the imposition of sanctions . . .." *Cf. Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) (warning against turning attorneys' fees disputes into "a second major litigation"). Indeed, in this case, respondents were allowed to take discovery from Danik on the Rule 11 issue, even though they had already filed their Rule 11 motion claiming a right to obtain sanctions, while at the same time insisting

that they needed additional information to prevail on that motion.

Second, the filing of a Rule 11 motion, while a substantive motion is pending, generally raises several possible conflicts of interests between the attorneys and the client. To begin with, Rule 11 specifically allows for sanctions to be imposed against either the attorney, or the client, or both. Since sanctions are usually sought against both attorney and client, as they were here, the lawyer has an inherent conflict of interest if the Rule 11 motion has any arguable basis whatsoever. Because the lawyer will have a direct personal stake in the Rule 11 outcome, he or she may become more concerned about defending the Rule 11 motion than about opposing the motion to dismiss, which principally affects only the client.

Furthermore, we have seen a number of sanctions motions in which, under the ordinary standards of conflicts of interest, the client needs separate representation, since the best way for the client to avoid liability is to blame any mistakes on the attorney, especially if the question relates to the adequacy of the legal investigation or whether a reasonable inquiry into the facts was conducted before the filing of the complaint. However, in the typical case, the client does not recognize the need to obtain separate representation immediately, and lawyers are generally slow to call the problem to the client's attention. It is only after the sanctions judgment has been entered, and the case is on appeal, that the client will obtain separate counsel, well after the point when an adequate record can be presented explaining the diverging interests of the lawyer and client. Indeed, in those cases where the lawyer is employed by a nonprofit organization, the conflict may become a three-way proposition, with different standards of liability applying to client, lawyer, and employer.

Beyond this problem relating to the need for separate representation on the sanctions issue, there is another problem that arises even if the sanctions motion does not create this divisiveness between lawyer and client at the outset of the case. If the defendant is both moving to dismiss and moving for sanctions, and the lawyer has to defend both motions at the same time, that will have an immediate and adverse impact on the merits. Thus, the lawyer will be in a position of arguing both that the case should not be dismissed, but even if it should, the arguments are not so frivolous as to be a basis for imposing sanctions. Not only does having to defend simultaneously against the Rule 11 motion have the effect of undermining the defense of the substantive motion, it is our experience that such simultaneous filings are often done for the very purpose of assuring a dismissal, with the imposition of sanctions just icing on the cake.

Finally, the tactics employed by defense counsel in this case, while not unlawful or unethical, illustrate still another serious problem with filing Rule 11 motions while motions to dismiss are pending. As set forth in greater detail in petitioner's brief, respondents were given the opportunity, over Danik's objection, to depose Danik's principal owner about the pre-complaint investigation while the Rule 12 motion to dismiss filed by respondents was still pending. Not surprisingly, the deposition moved into several areas touching on the attorney-client privilege, thereby making the choice between defending on the merits and fighting off sanctions even more painful. While attorney-client privilege issues may be unavoidable *after* the merits are resolved, allowing Rule 11 motions to be filed in circumstances such as this unnecessarily exacerbates the problem, with no increase in fairness or accuracy in the

litigation process to justify driving this further wedge between attorneys and their clients.

For these reasons, we urge the Court, in passing on the Rule 41(a)(1) issue, to hold that it was irrelevant that respondents had filed a Rule 11 motion before the notice of dismissal was filed. Simultaneous filings of substantive motions and motions under Rule 11 should be viewed with great skepticism and surely should not be encouraged by having the pendency of the Rule 11 motion affect the outcome in this case. We further urge the Court to make it clear that the time for filing a sanctions motions is *after* the substantive motion has been resolved, when the parties will have the benefit of the district court's rulings. At that point, it may be apparent that the court would look with substantial disfavor on a Rule 11 motion, or it may be clear that the court is inclined to grant modest sanctions, and hence the matter might be resolvable without further litigation. At the very least, a limited delay in filing will assure that unnecessary satellite litigation under Rule 11 will not occur and conflicts of interest of the kind described above are avoided — results that will produce positive benefits to judges, clients, and lawyers in federal court litigation.

B. *Scope of Review*

There are three basic types of questions presented in sanctions cases, each requiring a separate standard of review, as the Ninth Circuit has recognized in *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 828 (9th Cir. 1986). We agree with that analysis and explain our reasons below.

1. *Historical Facts.*

In many sanctions cases, the court has to determine what was done by the lawyer before a particular pleading was filed, *i.e.*, did he or she interview certain witnesses or read certain documents? When the issue is legal, rather

than factual, the inquiry will include what was the nature of the research, how many hours were spent, what cases were read, and were the leading authorities shephardized? Like all other questions of fact, these should be subject to the clearly erroneous standard under Rule 52(a), much as the courts have done for attorneys' fees when those types of issues have arisen in disputes in that area. *Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp.*, 540 F.2d 102, 116 (3d Cir. 1976).

2. *Rule Violations.*

Based on the facts found, the next question is, did the attorney violate the standards under Rule 11? The answer to that question is resolved by applying the facts to the law. Because it is important for lawyers to know what is expected of them, and because Rule 11 does not suggest that, once the basic facts have been found, there should be different standards for different judges or in different parts of the country, it is critical that there be uniform answers to a given question. Accordingly, review on the issue of whether Rule 11 has been violated should, like all questions of law, be reviewed *de novo*.

Such a standard does not preclude some deference to the district court on what constitutes a reasonable inquiry. Thus, the customs and experiences of the members of the Bar in that district surely count for something in determining whether the inquiry was reasonable. To the extent that the reasonableness inquiry is not included in the factual determinations, it would entitle the court of appeals to give the benefit of the doubt to a trial judge in a close case. However, that standard is a far cry from the relaxed, abuse of discretion standard applied by the D.C. Circuit. Indeed, under 42 U.S.C. § 1988, which authorizes fees in civil rights cases by the district court "in its discretion," this Court has not hesitated to review the legal standards with no hint of

deference to the district court. *See e.g., Blum v. Stenson*, 465 U.S. 886 (1984); *Hensley v. Eckerhart, supra.*

Defining the proper standard of review is not merely a question of picking among equally appropriate alternatives. Rather, the scope of review may not only determine the result of an appeal, but may sharply affect whether a sanction will be imposed in the first place. Litigation is inherently an adversarial process, in which tempers sometimes become short, lawyers occasionally overstep the grounds of civility in representing their clients zealously, and trial judges, like all human beings, develop animosities toward one party or one attorney in some cases. Rarely will the outcome on the merits be affected by such human frailties, but that cannot be said with confidence on the matter of sanctions, as indeed this case seems to suggest. *See* Brief of Petitioners at 12 (reciting sequence of events suggesting that long-dormant sanctions motion was apparently revived by counsel's actions in an unrelated case). While no system of review can prevent all miscarriages of justice, applying a *de novo* standard will help assure that a trial judge's decision on a sanctions motion will be made for reasons that are proper under the law.

There is a final reason why this element of a sanctions ruling should be reviewed *de novo*. In assessing the proper scope of review, fundamental principles of fairness require that, if an abuse of discretion standard is applied in reviewing a sanction that has been imposed, the same standard must be applied if a party has sought sanctions, but they have been denied. There is no basis in the Rule or otherwise for different degrees of appellate review depending on whether the sanctions motion was successful; if district judges are given broad discretion in one situation, they must be given it in the other. However, under the

approach of the court of appeals, regardless of how the sanctions motion is resolved, there is a vast potential for undermining the standards established by the Rule. Thus, if district judges do not impose sanctions when Rule 11 requires it, or impose them when the Rule forbids it, they have, in effect, the power to rewrite Rule 11. Nothing of which we are aware gives district courts such power, and the scope of review should not be used as a back door means of achieving that result.

3. *The Appropriate Sanction.*

Courts have wide ranges of choices in imposing sanctions, from reprimands, to small fines, to partial or full attorneys' fees. In making that choice, it is important for courts to keep in mind that the goal of Rule 11 is deterrence, not compensation. *See Advisory Committee Notes, supra*, 97 F.R.D. at 198 (noting inadequacy of prior Rule in "deterring abuses" and stating goal of amended Rule to "discourage dilatory or abusive tactics..."); *id.* at 199-200 ("word 'sanctions' in the caption... stresses a different orientation in dealing with improper pleadings, motions or other papers"). Thus, while an award of attorneys' fees may sometimes be necessary as a means of deterring the sanctioned conduct, such an award is a means to an end, not an end in and of itself, as is the case in fee-shifting statutes. The district court is in the best position to assess the entire case and thereby to decide on the appropriate level of deterrence. Because that will vary from case to case, district courts should be given broad leeway in making their choices, which should be reviewable under an abuse of discretion standard, subject to the following limitations.

For instance, if a district judge determines that the proper sanction is an award of attorneys' fees, there may nonetheless be some questions left that are not subject to the abuse of discretion standard. Thus, if the award is for

the time of in-house counsel, the proper hourly rate must be chosen. Should the market rate, which would be used in most attorneys' fees cases under 42 U.S.C. § 1988 or the antitrust laws, be applied, or does the portion of Rule 11 referring to "reasonable expenses incurred" suggest a cost-based approach? That issue is not presented here because respondents used outside counsel, but the question of which rate is proper is a discrete question of law, reviewable *de novo*, even though it is an element in deciding the appropriate sanction, which is reviewable on an abuse of discretion basis. *See Snow Machines, Inc. v. Hedco, Inc.*, 838 F.2d 718, 725 (3d Cir. 1988).

Similarly, if a sanction of attorneys' fees has been granted where a defendant filed a wholly improper motion to disqualify counsel, the question of whether that would entitle the plaintiff to fees for the entire case, or just for opposing that motion, is a question of law, not answered under the abuse of discretion standard. Or, if the court makes a factual finding as to the number of hours worked on a particular motion, that finding would be subject to the clearly erroneous standard under Rule 52(a).

Our basic point is that it is essential for the reviewing court to examine the specific objection being made to the particular sanction and to apply the appropriate standard of review to that objection. To be sure, a single standard of review for all sanctions questions has the virtue of simplicity and, as such, is a seductive approach. But like most seductive approaches, it has far more risks than benefits and accordingly should be rejected by the Court.

C. *Fees on Appeal.*

The court of appeals, following its prior decision in *Westmoreland v. CBS, Inc.*, 770 F.2d 1168, 1179-80 (D.C. Cir. 1985), ruled that a party that successfully defends a Rule 11 sanctions motion on appeal is automatically entitled

to fees for doing so. According to the court, such a rule is necessary to prevent the erosion of the award by having to spend uncompensated time defending it on appeal. While we do not disagree with the dilution premise, that premise applies every time an appellee has to defend any monetary award made by a district court, and therefore cannot be a basis for determining the outcome of this particular fee-shifting inquiry.

The court of appeals did not rely on any specific authorization for awarding fees for the appeal. Rule 11, of course, contains no such authorization, and, like all of the Rules of Civil Procedure, it is applicable only to the district court. *See* Rule 1. Moreover, Rule 11 is not intended as a general compensation provision, but is designed to deter substandard conduct, with an award of attorneys' fees simply a means to that end.

On the other hand, there is a Rule specifically applicable to fees for appeals, Rule 38 of the Federal Rules of Appellate Procedure, which is based on 28 U.S.C. § 1912. Rule 38 allows damages, as well as single or double costs, which have been interpreted to include attorneys fees, but only if the appeal is "frivolous." *See also* 28 U.S.C. § 1927 for additional authority to impose sanctions, including attorneys fees, in exceptional circumstances. There would, of course, be no issue of power to award fees if the court of appeals had found the appeal frivolous in this case, but it did not. Moreover, there is no other apparent authority for awarding fees, and the general American Rule is that, with certain narrow exceptions not applicable here, fees are not awarded in the absence of statutes specifically authorizing them. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975). Even assuming that a Rule such as Rule 11 or Rule 38 could modify the general American Rule, if it explicitly provided for automatic fee-shifting, neither

Rule has done so here, and, indeed, Rule 38 has provided a very different standard.

It is true that, when Congress has decided to allow fees to a prevailing plaintiff, it is generally held that fees are available for obtaining and/or defending the fees that are awarded. *E.g.*, *Gagne v. Maher*, 594 F.2d 336, 343-44 (2d Cir. 1979), *aff'd*, 448 U.S. 122 (1980); *but see American Academy of Pediatrics v. Bowen*, 795 F.2d 211 (D.C. Cir. 1986) (EAJA fees not available where government acts reasonably in interposing technical defenses in opposing fees). This result under fee-shifting statutes is distinguishable from the Rule 11 situation in several important respects. First, in those statutes Congress has made a policy judgment that full attorneys' fees are of paramount importance, whereas Rule 11 contains no such overriding goal. Second, fee-shifting statutes are primarily intended to be compensatory, whereas deterrence not compensation is the principal goal of Rule 11. Finally, under most fee-shifting statutes, the lawyer is acting as a private attorney general, and the legislative decision to award fees is based in part on the need to provide an incentive to attract counsel to advance important government policies, which might not be pursued without that incentive due to marketplace imbalances.

Relying on the need to advance the supposed compensation policies of Rule 11, the court of appeals believed that fees on appeal were automatically required. What the court of appeals overlooked, however, is that there are two policies that have to be carefully balanced in applying Rule 11. The first is to deter improper conduct, which the court of appeals recognized, but the second is to assure that proper litigation is not chilled through over-deterrence. *See Advisory Committee Notes*, *supra*, 97 F.R.D. at 199. When that policy is taken into account, as it

must be, the resulting balance is very different. In order to illustrate the problem with the approach of the court of appeals, it is useful to examine other possible sanctions appeals, different from this case in which the award of sanctions was followed by an unsuccessful appeal.

Thus, if respondents here had been unsuccessful in seeking sanctions, and they had taken an appeal and won, would they be entitled to fees for the appeal? If the sole purpose of Rule 11 was as stated by the court of appeals, there would be no doubt that fees should be awarded there as much as they were in this case, as indeed they were in *Westmoreland*, the case relied on by the court of appeals here. Such a result would clearly encourage vindication of Rule 11, but it would also encourage appeals and substantially increase satellite litigation.

Or, assume that respondents had failed to gain sanctions, had appealed, and lost. In that situation, given the multiple purposes of the Rule, appellee — petitioner here — should also be entitled to fees since, if they were not awarded, it would create an asymmetry not justified by any of the Rules. Indeed, Rule 38 would support a fee award in that situation far more than it would support a fee award in the preceding example because Rule 38 specifically allows fees to a successful appellee, but not to a victorious appellant.

Or, suppose that respondents had obtained a sanctions award in the district court, and that petitioner had appealed, and the court of appeals had reversed. Since one of the concerns of Rule 11 is not to chill potentially meritorious litigation, under the analysis of the D.C. Circuit Rule 11 would best be served by awarding fees in that case also. Yet, Rule 38 points in precisely the opposite direction. Thus, while the court of appeals suggested that allowing

fees in this case was a narrow exception, its rationale has no limitation as applied to sanctions cases.

There are other problems with the result reached by the court of appeals. In this case, the sanction against petitioner exceeded $20,000, which created a monetary incentive, as well as a desire to vindicate the firm's reputation, for taking an appeal. But suppose the "fees for fees" rule of the court of appeals were followed, and the district court had, quite correctly, imposed only a small sanction — say $500 — because it thought that the pre-complaint investigation was deficient in some respect. In that case, the lawyer would have to be very confident of victory to risk not only spending time in prosecuting the appeal, but also the real risk of additional fees at perhaps $200 per hour for 50-100 hours if the appeal is unsuccessful.

To be sure, if fees were allowed *only* for defending an award of sanctions on appeal, that would reduce the incentives to appeal a small award, but there are already more than ample disincentives in taking an appeal for a lawyer who regularly appears in a court of appeals and for whom a published, adverse sanctions opinion would do serious damage to his or her reputation. And, if the appeal is frivolous, there is always the possibility of the court invoking Rule 38 or 28 U.S.C. § 1927. Thus, the rule allowing fees for appeals adopted by the D.C. Circuit would virtually insulate from review the quite common sanction of a modest monetary award, coupled with a sharper, and sometimes unwarranted criticism of the lawyer's performance.[3]

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[3] For two cases in which Public Citizen attorneys represented other attorneys who sought review in this Court of small sanctions awards, *see McNeil v. United States*, No. 87-992 ($278.68) and *Platt v. U.S. Court of Appeals for the Seventh Cir.*, No. 88-1756 ($1000, plus costs of appeal).

Perhaps the courts should have broad discretion in all sanctions cases to award fees on appeal, depending on all the facts and circumstances of the case. However, the present Rules do not give the courts any such authority, and Rule 38 seems quite clear that fees are awardable only for frivolous appeals. Moreover, the court of appeals never faced the question of why the policies behind Rule 11 are so much stronger than the policies behind the securities laws, the tort laws, or any of the other federal and state laws which form the basis for lawsuits in the federal courts. The rationale offered by the court of appeals would apply in every appeal involving those cases, and for that reason alone cannot be used to justify the award here. Accordingly, for all of those reasons, there is no basis for awarding fees for Rule 11 appeals, unless the standards of Rule 38 or 28 U.S.C. § 1927 are met. *Accord*, American Judicature Society, *Rule 11 in Transition: Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11*, 52 (1989).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

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No. 89-275

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

COOTER & GELL,

Petitioner,

v.

HARTMARX CORPORATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF THE CHICAGO COUNCIL OF LAWYERS AS AMICUS CURIAE

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BRIEF OF THE CHICAGO COUNCIL OF LAWYERS AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The Chicago Council of Lawyers is a public interest bar association with a long standing commitment to promoting high ethical standards for attorneys. Founded in 1969, the Council's membership

includes attorneys in private practice, government service, and law schools.

Rule 11 of the Federal Rules of Civil Procedure provides for an award of sanctions against attorneys who do not conform to its standards. Such awards are of considerable concern both to attorneys who seek sanctions and attorneys who are charged with them. Together with Pavelic & Leflore v. Marvel Entertainment Group, No. 88-791 (O.T. 1989), this case presents this Court with its first opportunity since Rule 11 was amended in 1983 to consider the Rule's impact on federal court practice.

The Council is filing this brief to address two important questions concerning the administration of Rule 11: (1) the standard of appellate review of district court orders under Rule 11, and (2) the circumstances under which a party that receives an award of fees in the district court is entitled to an additional

award of fees incurred in successfully defending that award on appeal.1/

This brief is filed with the consent of both petitioner and respondent pursuant to this Court's Rule 36.2.

SUMMARY OF ARGUMENT

This brief amicus curiae is submitted in support of the holding of the United States Court of Appeals for the District of Columbia Circuit on the standard of appellate review. However, we

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1/ At the invitation of the United States Court of Appeals for the Seventh Circuit, the Council submitted an amicus brief and participated in oral argument in Mars Steel Corp. v. Continental Bank, N.A., 880 F.2d 928 (7th Cir. 1989) (en banc) to address the first of these issues. There, as here, the Council argued for abuse of discretion as the standard of review in Rule 11 cases.

respectfully disagree with the approach taken by the court of appeals on appellate attorneys' fees.

1. Standard of Review. The appropriate standard of appellate review for a district court's award of Rule 11 sanctions is abuse of discretion. This standard should apply whether the decision under review awarded or denied sanctions, as the nature of the judicial inquiry is the same in either case. Moreover, this standard should apply under all Rule 11 branches, that is, whether the party seeking sanctions alleges that the paper signed is (a) not well grounded in fact, (b) not warranted by existing law, (c) not warranted by a good faith argument for the extension, modification, or reversal of existing law, or (d) interposed for an improper purpose. The first three branches of Rule 11 involve a decision as to whether the attorney filing a paper acted

reasonably under the circumstances. The concept of "reasonable inquiry" modifies all of these "objective" aspects of Rule 11. The fourth branch necessarily involves a factual inquiry into the filing attorney's purposes or intent in light of the litigation context.

Abuse of discretion is the standard best suited to appellate review for two reasons. First, the decision whether a filing violates Rule 11 requires the district court to determine whether counsel's inquiry or purpose was reasonable in light of the circumstances of the particular case and the litigation context. This is a judgment that the district court, by virtue of its experience with the litigation at hand and trial court practice generally, is far better positioned than the court of appeals to make. Second, although a primary function of appellate review is to provide rules that

minimize disparities among decisions by the district courts, the fact-intensive nature of Rule 11 decisions suggests that this is not an area to which appellate courts can expect to bring harmony through the promulgation of general rules. To the contrary, ill-fitting general rules may have the undesirable affect of chilling legitimate advocacy.

2. Fees on Appeal. Fees should not be awarded automatically to the prevailing party in a Rule 11 appeal. Such fee-shifting is contrary to the rule in most civil litigation. The appropriate mechanism for obtaining an award of appellate fees is Rule 38 of the Federal Rules of Appellate Procedure, which provides for an award of fees where an appeal is "frivolous." But it does not automatically follow that an appeal from a Rule 11 sanction is frivolous just because a district court has imposed sanctions.

Depending on the basis for the district court's ruling, the appeal may well raise substantial legal issues.

Moreover, this Court should not encourage satellite litigation under Rule 11 by creating incentives to bring Rule 11 motions where the economic damage is small. In such cases, as the court of appeals noted, the award may well be reduced to nothing by the costs of defending an appeal. But because the public and the bar perceive a Rule 11 sanction as a serious injury to the sanctioned attorney's reputation, a sanctioned attorney has a strong incentive to seek vindication through an appeal, even if the sanction award itself is small. The serious disproportionality of benefits and burdens to the parties discourages settlement and impedes finality in litigation.

Finally, some members of the bar and the judiciary may reasonably believe

that Rule 11 functions as a method of policing and improving standards of practice in the district courts. Thus, it may be argued that attorneys who bring Rule 11 motions, even where the economic damage is small, function as "private bar examiners" who should be rewarded through an award of fees on appeal. However, because Rule 11 motions accompany and influence other litigation, the incentives to bring Rule 11 motions cannot be depended upon to coincide with the public interest. Other existing mechanisms are better suited to address systemic failures among the bar.

ARGUMENT

I.
THE APPROPRIATE STANDARD OF APPELLATE REVIEW OF RULE 11 DECISIONS IS ABUSE OF DISCRETION.

The courts of appeals should review district court Rule 11 decisions under a highly deferential standard of review for two reasons. First, a deferential standard of review recognizes that district courts have more knowledge than the courts of appeal as to prevailing trial court practice and thus are better positioned to determine whether counsel acted reasonably under the circumstances. Second, the issues raised by most Rule 11 motions are fact specific. It would be a waste of judicial resources to undertake a searching review of the record in cases where the appellate courts are not likely to develop meaningful general rules to guide the district courts.

A. Deferential Review Is Appropriate Because The District Court Is Better Positioned To Determine Whether Counsel's Actions Have Been Reasonable Under The Relevant Circumstances.

Rule 11 provides, in relevant part:

> The signature of an attorney or party constitutes a certificate by the signer that . . . to the best of the signer's knowledge, information, and belief formed after reasonable inquiry [the pleading, motion or other paper] is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose . . . .

The phrase "after reasonable inquiry" modifies all that follows. Thus the central issue faced by the district court in deciding a Rule 11 motion is "one of reasonableness under the circumstances." Fed. R. Civ. P. 11 (Advisory Committee Notes to 1983 Amendment); Brown v. National Board of Medical Examiners, 800 F.2d 168,

171 (7th Cir. 1986). As the Advisory Committee that drafted the 1983 Amendment recognized,

> what constitutes a reasonable inquiry may depend on such factors as how much time for investigation was available to the signer; whether he had to rely on a client for information as to the facts underlying the pleading, motion, or other paper; whether the pleading, motion, or other paper was based on a plausible view of the law; or whether he depended on forwarding counsel or another member of the bar.

Fed. R. Civ. P. 11 (Advisory Committee Notes to 1983 Amendment).

Rule 11's objective "reasonableness" standard is a familiar concept borrowed from the law of negligence. Hays v. Sony Corp., 847 F.2d 412, 418 (7th Cir. 1988); cf. The Germanic, 196 U.S. 589, 595-96 (1905); Seavey, Negligence -- Subjective or Objective? 41 Harv. L. Rev. 1, 3-5 (1927) (discussing "external" or "objective" test of negligence). The

reasonableness of any act or omission of counsel can only be assessed in light of the court's understanding of what reasonable counsel would have done when faced with the same resources, opportunities, information, and time. This inquiry is necessarily fact specific.[2/] And it is an inquiry that the district courts are much better qualified to make than the courts of appeal are positioned to review de novo, because the district courts are far better positioned to evaluate counsel's actions in the relevant litigation context.

This Court has recently reaffirmed that the selection of an appropriate standard of review frequently depends on

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2/ It goes without saying that an inquiry into counsel's "improper purpose," like any intent question, is fact specific. See, e.g., Rogers v. Lodge, 458 U.S. 613, 623 (1982) ("issues of intent are commonly treated as factual matters").

which judicial actor is "better positioned than another to decide the issue in question." Pierce v. Underwood, ___ U.S. ___, 108 S. Ct. 2541, 2547 (1988) (quoting Miller v. Fenton, 474 U.S. 104, 114 (1985)). While not dispositive, this Court's decision in Pierce is highly persuasive authority that the abuse of discretion standard should apply under Rule 11.

In Pierce, this Court held that abuse of discretion was the appropriate standard of review of district courts' determinations that attorneys' fees should be awarded to private litigants pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d)(1)(A) in suits against the federal government. The EAJA provides that prevailing private litigants are entitled to fees "unless the court finds that the position of the United States was substantially justified." Id. In Pierce,

this Court held that the district court's determination as to whether a position was "substantially justified" merits "deferential, abuse-of-discretion review," 108 S. Ct. at 2547, for several reasons.

First, the district court "may have insights not conveyed by the record" that the district court obtains from its observation of and colloquy with the parties during pretrial activities and settlement conferences. Id.; cf. White v. Regester, 412 U.S. 755, 769-70 (1973) (applying deferential standard of review of district court finding of discrimination in voting-rights case based on the "special vantage point" of the district court in assessing the impact of local history on voting patterns); accord, Thornburg v. Gingles, 478 U.S. 30, 78-79 (1986). Moreover, even if the relevant facts could be found in the record, substantial judicial resources would be required to

undertake an "unaccustomed" review of the entire record for the collateral purpose of determining whether a losing position was substantially justified. Pierce, 108 S. Ct. at 2547.

Second, even if the issue appears to be purely legal -- i.e., if the private litigant alleges that the Government advanced an erroneous view of the law -- the true issue is "not what the law now is, but what the Government was substantially justified in believing it to have been." Id. at 2548. This initially involves an "historical" inquiry by the court into what the law was at the time the Government advanced its position. Id. Then the court must decide whether a given litigation position could have been substantially justified based on that state of the law. This unusual inquiry "will strongly distort the appellate process," id., because courts of appeal

typically decide what the law is, not how far off the mark a litigant's position was.

This Court's analysis in Pierce demonstrates that abuse of discretion is the proper standard of review in Rule 11 cases. Indeed, the district court's superior perspective is more evident in Rule 11 cases than in EAJA cases, because under Rule 11 the inquiry goes not to an overall litigation position but to a particular statement of law or fact in a particular filing. Time pressures and the availability of resources impact more severely upon a given filing than upon a long-term litigation strategy. These fact-bound issues are more relevant under Rule 11 than under the EAJA.

Moreover, judging whether a losing legal argument is "frivolous" is a question of degree. While it may be easy in the abstract to imagine paradigmatic

arguments that are frivolous on their face, legal arguments are not presented to courts in the abstract. An argument may be wrong but competent in one factual context and frivolous in another. The district court has the best view of the context.[3/] Mars Steel Corp. v. Continental Bank, N.A., 880 F.2d 928, 934 (7th Cir. 1989) (en banc).

Thus, more persuasively under Rule 11 than under the EAJA, the district court is best situated, through its

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3/ Even accepting the often-argued proposition that the court of appeals is at no disadvantage in assessing whether an argument is legally frivolous, situations are rare in which the district court's superior perspective on the surrounding facts is irrelevant. The existence of these rare situations is not sufficiently compelling to justify carving out an exception to the general rule of deferential review. Even under a highly deferential standard, the court of appeals can correct the district court's salient errors.

familiarity with the case dynamics and the attorneys practicing before it, to apply the reasonableness standard and to make the relevant judgment call. That is because the district court has both a vertical and horizontal view of litigation that the court of appeals lacks and that the cold record cannot fully reflect.

The vertical dimension describes counsel's conduct in the given case. Appellate judges see attorneys in a limited and formal set of circumstances at a stage where the factual record has been crystallized and the legal issues narrowed. But practice in the trial courts involves frequent appearances by counsel during a case in widely varied procedural settings, such as motion practice, discovery disputes, status conferences, and settlement negotiations. Over time, the district judge overseeing the litigation develops an "intimate familiarity with the case,

the parties, and counsel, a familiarity [the court of appeals] cannot have." O'Connell v. Champion Int'l Corp., 812 F.2d 393, 395 (8th Cir. 1987). Through these experiences, the district judge develops a sense of counsel's credibility and candor, as well as the tactical and emotional dynamics that develop in the course of the litigation, that may be decisive in resolving disputed Rule 11 issues. Like any first-hand credibility determination, the district judge's feel for the case cannot fully appear of record and deserves substantial deference on appeal. See Pierce, 108 S. Ct. at 2547.

Perhaps more importantly, the district court also has a horizontal view of practice in the district. The district judge sees a wide variety of counsel and a wide variety of counsel on a daily basis. Thus, "the district court will have a better grasp of what is acceptable trial-

level practice among litigating members of the bar than will appellate judges." Thomas v. Capital Security Services, Inc., 836 F.2d 866, 873 (5th Cir. 1988) (en banc). Having this perspective is what enables the judge to apply a "reasonableness" standard. By abandoning subjective bad faith as the sole basis for Rule 11 sanctions, the 1983 revisers desired to make Rule 11 "objective." Mars Steel, 880 F.2d at 932. Like all objective tort standards, "reasonable" means reasonable in relation to the behavior of a given population of attorneys. The district court sees that population every day and has the best insight into its standards of practice.[4/]

4/ To the extent that Rule 11's revisers may have intended to foster a national standard of acceptable practice in the federal courts, district judges are still

(Footnote Continued)

Because the court of appeals lacks the district court's vertical and horizontal perspectives of trial-court practice, it is poorly situated to second-guess the district court's informed judgment. De novo review would require the court of appeals to review the entire record and substitute its judgment for that of the district court. But the court of appeals cannot supply the specialized experience that informs the judgment. Deferential review thus provides the most appropriate allocation of judicial resources based on the district court's superior vantage point.

(Footnote Continued)
better situated than appellate judges to judge standards of practice in their own courts. Moreover, Rule 11 is a very blunt tool with which to fashion federal practice standards, because it depends on the motivation of isolated private litigants, not the considered collective views of bench and bar.

B. Deferential Review Is Appropriate Because Rule 11 Cases Are Fact Bound, And Intensive Appellate Scrutiny Will Not Yield Useful General Rules To Guide The District Courts.

An important function of appellate review is the formulation of rules to guide the district courts. But as this Court noted in Pierce, deferential review is appropriate where the questions likely to be litigated are "multifarious and novel" and "little susceptible, for the time being, at least, of useful generalization." 108 S. Ct. at 2548; see also Mars Steel, 880 F.2d at 933 ("Fact-intensive disputes, those whose resolution is unlikely to establish rules of future conduct, are reviewed under a deferential standard because the role of appellate courts in establishing and articulating rules of law is not at stake.").

Deferential review will not prevent the development of rules to guide the district courts. As this Court noted in Pierce, the abuse of discretion standard permits rules to develop in light of experience. 108 S. Ct. at 2548. Because Rule 11 cases are fact specific, it is dangerous to generalize from the facts of a single case. But over time, fact patterns and repeated types of abuse may emerge and become appropriate subjects for appellate rulemaking.

On the other hand, de novo review would have the effect of establishing "multifarious" rules of law in collateral proceedings. Again, in Pierce, this Court observed that the question whether a legal position is unreasonable may often arise after the case on the merits has been settled or dismissed, thus in effect forcing the court of appeals to render an advisory opinion. 108 S. Ct. at 2548.

And if the law is unclear, de novo review will settle the substantive legal question collaterally, a process this Court described as "a most peculiar, second-handed fashion" of deciding points of law. 108 S. Ct. at 2548.

Rule 11 cases are highly fact specific. Whether counsel's investigation was reasonable, or whether his or her purpose was improper, can turn on the complexity of the facts to be investigated and the legal issues implicated, the clarity of the legal rules at issue, the time available for investigation, the research tools and investigative resources available to counsel and reasonably affordable by the client, and the reputation of co-counsel for reliability in supplying factual and legal research. See Fed. R. Civ. P. 11 (Advisory Committee Notes to 1983 Amendment). For this reason several courts of appeal, including two en

banc courts, have adopted an abuse of discretion standard of review in Rule 11 cases. See, e.g., Mars Steel Corp. v. Continental Bank, N.A., 880 F.2d 928, 936 (1989) (en banc); Thomas v. Capital Security Services, Inc., 836 F.2d 866, 873 (5th Cir. 1988) (en banc); see also Shaffer, Introduction: Rule 11: Bright Light, Dim Future, in American Bar Association Section of Litigation, Sanctions: Rule 11 and Other Powers at 1, 15 (2d ed. 1988) (recommending adoption of the abuse of discretion standard).

Where cases are fact specific, the decision of a court of appeals becomes, as Justice Roberts once said in a different context, "a restricted railroad ticket, good for this day and train only." Smith v. Allwright, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting). A searching standard of review that requires the court of appeals to canvass the entire record de

novo is therefore a waste of judicial resources. Thus, this Court has adopted a deferential standard of review in cases that tend to turn on particularized fact patterns that do not afford the opportunity for meaningful appellate generalization. Pierce, 108 S. Ct. at 2548; see also Icicle Seafoods, Inc. v. Worthington, 475 U.S. 709, 714 (1986) (determination whether a fishing-boat employee had the characteristics of a "seaman" pursuant to 29 U.S.C. § 213(b)(6)); Curtiss-Wright Corp. v. General Electric Co., 446 U.S. 1, 10-11 (1980) (certification of final order under Fed. R. Civ. P. 54(b)).

It is frequently argued that, even if the court of appeals cannot establish meaningful appellate guidelines in fact-specific Rule 11 cases, de novo review is necessary to ensure fairness to attorneys stigmatized by a Rule 11 sanction. But lawyers have no special claim

to protection from stigma. The loser in a medical or accounting malpractice case faces considerable personal and professional stigma. Yet appellate courts do not apply a searching standard of review to protect those losers' sensibilities, professional reputations, or careers. See Mars Steel, 880 F.2d at 936. While all courts have a special interest in maintaining standards of legal practice, it ill behooves lawyers to claim a special privilege of review not afforded to other persons or professions.

In sum, the abuse of discretion standard of review is best suited to both the relative expertise of the trial and appellate courts and the sui generis nature of Rule 11 litigation. This Court should affirm the application of that standard in Rule 11 cases.

II.
THE PREVAILING APPELLEE IN RULE 11 CASES SHOULD NOT AUTOMATICALLY RECEIVE AN AWARD OF ATTORNEYS' FEES ON APPEAL.

The court of appeals below remanded to the district court so that the district court could enter "an appropriate award" under Rule 11 to cover the appellee's attorneys' fees incurred in the appeal, thus creating an automatic entitlement to fee shifting in the successful defense of a Rule 11 award. Danik, Inc. v. Hartmarx Corp., 875 F.2d 890, 898 (D.C. Cir. 1989). The court expressly declined to award fees pursuant to Fed. R. App. P. 38, which provides for an award of fees on appeal only if the appeal is "frivolous." Id. 875 F.2d at 897. Instead, the court determined that the appellate attorneys' fees of a party that successfully defends a Rule 11 award on appeal should automatically receive reimbursement of those fees because the fees were "'incurred because

of' the filing for which sanctions [were] imposed by the district court." Id., quoting Fed. R. Civ. P. 11.

This approach creates an unjustifiably unique rule for fee shifting on appeal and circumvents the plain language of Fed. R. App. P. 38. Moreover, the court of appeals' approach will increase satellite Rule 11 litigation at the district court level without significantly enhancing the systemic benefits Rule 11 was meant to address.

A. Rule 11 Litigation Is Not Subject To A Special Fee Shifting Rule On Appeal.

The court of appeals held that a party that successfully defends a Rule 11 award on appeal must automatically be entitled to appellate attorneys' fees because the costs of defending an appeal might exceed the amount of the Rule 11

award, "thus forcing many litigants in appellant's position to conclude that the vindication of the Rule 11 interests is not worth the candle." Danik, Inc. v. Hartmarx Corp., 875 F.2d at 897 (quoting Westmoreland v. CBS, Inc., 770 F.2d 1168, 1179 (D.C. Cir. 1985)). While this argument has surface appeal, it proves far too much. The same reasoning would apply to a party that receives a proportionally small award in a personal injury or medical malpractice case. Thus, strictly from the viewpoint of the party's financial interests, there is no general rule that the party's trial-court award must be protected against erosion by the expense of attorneys' fees in defending an appeal.5/

5/ Indeed, Congress has made express provision to protect a successful appellee

(Footnote Continued)

The rule governing fees on appeal to a court of appeals is Fed. R. App. P. 38, which provides:

> If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

"Damages" under Rule 38 include attorneys' fees. See Fed. R. App. P. 38 (Advisory Committee Notes). But by its express terms, the prerequisite to a fee award under Rule 38 is a finding that the appeal is frivolous. See, e.g., United Steelworkers of America v. Danly Machine Corp., 852 F.2d 1024, 1028 (7th Cir. 1988) (declining to impose Rule 38 sanctions where appeal, although "unnecessary" and

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(Footnote Continued)
against statutorily defined "costs" of appeal and the interest loss caused by a delay in obtaining judgment. 28 U.S.C. § 1912. By obvious implication, Congress has made no provision for protection against the expense of attorneys' fees.

"waste[ful]," "had credence"); Stroh Container Co. v. Delphi Industries, Inc., 783 F.2d 743, 753 (8th Cir.) (losing appeal not frivolous under Rule 38 where issues "were not and are not entirely settled"), cert. denied, 476 U.S. 1141 (1986).

The merits of an appeal are wholly separate from the question whether a pleading, motion, or other paper filed in the district court was frivolous. An appeal from an award of Rule 11 sanctions may well raise substantial legal issues and not itself be frivolous. Certainly there is no basis for holding that such appeals are presumptively frivolous.

The approach taken by the court of appeals below evades Rule 38. Indeed, if fees on appeal should be awarded pursuant to Rule 11 itself as consequential damages, logic requires that fees should be awarded for the costs of any further

proceedings in this Court as well, including both the expense of responding to a petition for a writ of certiorari and proceedings on the merits if certiorari is granted. That is, while Rule 38 applies only to fees in the courts of appeals, the "consequential damages" approach applies to all fees incurred in defending the award, including fees in this Court. Thus, even in a case where this Court has granted certiorari because the certiorari petition raises important legal questions and is not frivolous, an unsuccessful petitioner would still be required to pay the respondent's attorney's fees here.

To be sure, Rule 11 expresses a public as well as a private interest -- the public interest in deterring frivolous litigation. Thus, the court of appeals below apparently thought that the appellee was entitled to fees for "vindication of the Rule 11 interests." Danik, Inc. v.

Hartmarx Corp., 875 F.2d at 897. But the remand process imposed by the court of appeals prolongs satellite litigation, delays finality, and undesirably multiplies the cost of litigation over a collateral matter. Indeed, it can be predicted with some assurance that a remand to award fees would be followed by an appeal challenging the amount of the award. The public interest in deterring frivolous litigation must therefore be weighed against the public interest in avoiding court dockets clogged with litigation over fees. See Talamini v. Allstate Insurance Co., 470 U.S. 1067, 1069 (1985) (plurality opinion).

Congress and the Advisory Committees that draft the Rules know how to provide for appellate fees when they think a party is entitled to compensation for vindicating federal interests. Congress has expressly provided for an award of fees in any federal court where

an attorney "multiplies the proceedings in any case unreasonably and vexatiously." 28 U.S.C. § 1927. But no statute or rule governing appeals expressly provides for an award of attorneys' fees on appeal solely because a position taken in the district court was found to be frivolous.[6/] If Congress or the Advisory Committee had thought they were creating such a rule, surely their draftsmanship would have been more explicit.[7/]

6/ Several fee-shifting statutes enacted by Congress expressly provide appellate attorneys' fees to prevailing parties without a need to make the additional showing that the loser's position was frivolous. See, e.g., Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 415-16 (1978). These statutes are the sole source of the federal courts' pure fee-shifting powers. Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 262 (1975).

7/ We understand that the Advisory Committee on the Federal Rules of Appellate

(Footnote Continued)

The general rule in federal courts is that the parties bear their own attorneys' fees. Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 247 (1975). As this Court observed in Alyeska Pipeline, Congress has not extended

> any roving authority to the Judiciary to allow counsel fees as costs or otherwise whenever the courts might deem them warranted. What Congress has done, however, while fully recognizing and accepting the general rule, is to make specific and explicit provisions for the allowance of attorneys' fees under selected statutes granting or protecting various federal rights.

421 U.S. at 260 (footnote omitted). The circumstances under which attorneys' fees may be granted are "matters for Congress to determine." Id., 421 U.S. at 262.

(Footnote Continued)
Procedure is considering revisions to Rule 38. In any event, the Committee and Congress are the appropriate forums for rulemaking on appellate fees.

Congress has not determined that a Rule 11 appellee should receive fees as a matter of course absent the showing required by Rule 38 or Section 1927. The court of appeals below reached its determination as a construction of the text of Rule 11. But the existence of Rule 38 as the distinct Rule governing fee awards on appeal is dispositive evidence that the 1983 Rule 11 revisers and Congress did not intend the construction reached by the court of appeals.

Moreover, the court of appeals' construction of Rule 11's text offers less than meets the eye. The court of appeals held that the costs of defending an appeal are costs that are necessarily "incurred because of the filing of the pleading, motion, or other paper" in the district court. Danik, Inc. v. Hartmarx Corp., 875 F.2d at 898. In other words, had the sanctioned attorney not filed a frivolous

pleading, there would be no sanctions award from which to appeal.

This "for want of a nail" approach assumes that the district court, in awarding the sanctions, made no close judgment calls suggesting the possibility of a successful appeal. But where the district court has relied on debatable grounds, the "cause" of the appeal is, in a real sense, the district court's ruling, not the original filing. That is, in traditional tort concepts, the district court's ruling may well be an intervening cause that should limit the sanctioned attorney's further liability. The court of appeals cannot decide whether the appellee's fees were "incurred because of" the Rule 11 violation unless it first decides whether the appeal itself is frivolous.

Rule 11 itself gives the courts of appeals no direct authority to award

fees, as even the court of appeals here recognized. Danik, Inc. v. Hartmarx Corp., 875 F.2d at 898; see also Hays, 847 F.2d at 420. But by remanding to the district court with directions to enter an award of appellate attorneys' fees the court of appeals both avoided Rule 38 and Section 1927, under which it had power to award fees, and did indirectly under Rule 11 what it conceded it could not do directly. This Court should repudiate that approach, which has not been sanctioned by Congress and is itself disingenuous.

B. An Automatic Award Of Fees To The Successful Rule 11 Appellee Will Encourage Satellite Litigation Without Promoting Higher Standards Of Federal Practice.

The court of appeals was concerned that if the costs of defending an appeal exceed the amount of attorneys' fees awarded by the district court, an attorney might find that vindicating the award is "not worth the candle." Danik, Inc. v. Hartmarx Corp., 875 F.2d at 897. But this is only to be expected where a party brings a motion to redress a small economic loss. A party winning a small judgment in a contract or negligence case might well be expected to settle or abandon a case where the costs of defending an appeal will exceed the judgment. For the same reason, a party against whom a small judgment is assessed would be expected to pay the judgment or settle rather than mount an expensive appeal.

Rule 11 does not work that way. Attorneys sanctioned under Rule 11 frequently take the fact of the sanction more seriously than the amount of the award. See, e.g., Mars Steel, 880 F.2d at 931 (en banc appeal of sanction totalling $1,648); Golden Eagle Distributing Corp. v. Burroughs Corp., 801 F.2d 1531, 1540-41 (9th Cir. 1986). Thus, an attorney is likely to appeal to vindicate his or her reputation even if the cost of the appeal exceeds the dollar amount of the award. In other words, the cost of a sanction to the sanctioned attorney may substantially exceed the cost of the frivolous filing to the party seeking sanctions. This disproportionate impact will necessarily lead to appeals that are not cost-effective from the appellee's perspective.

This disparity of burdens is unique to Rule 11 cases. For example, although Rule 11 motions have been

analogized to a malpractice actions, see, e.g., Hays, 847 F.2d at 418, a party normally would not bring a medical or legal malpractice action as an original matter unless the prospect of substantial damages made the suit worthwhile. But Rule 11 motions, which by definition arise in the context of ongoing litigation, apparently require no such cost/benefit justification to bring and for some litigants may be made as a matter of course.

An automatic award of fees to a prevailing Rule 11 appellee thus provides a significant incentive to bring Rule 11 motions. But while Rule 11 was no doubt intended to serve the public interest in deterring frivolous litigation, no special incentives are needed to encourage Rule 11 motions that otherwise would not be brought, nor can such incentives be justified.

First, as noted above, parties making Rule 11 motions face no significant cost/benefit hurdle at the outset. While an injured party normally has to convince an attorney that the prospective judgment will be greater than the costs of suit, a party already involved in a suit will normally regard the cost of bringing a Rule 11 motion as incidental.

Second, because Rule 11 motions are incidental to the underlying dispute, they are not infrequently brought as part of an overall strategy in the underlying litigation. Attorneys who bring Rule 11 motions frequently perceive benefits to their overall litigation position through the threat value of the sanction. Thus, the benefit to the moving party is not necessarily limited to the cash value of the sanction. The motion itself, even if not ruled upon, may ultimately be a factor in gaining settlement or voluntary

dismissal of the case on the merits. That in itself is a substantial incentive to bring a Rule 11 motion

Third, attorney-fee shifting in derogation of the general "American Rule" generally arises where Congress has perceived a need to encourage "private attorneys general" in vindicating federal rights that otherwise would have to be vindicated by the federal government. Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 416 (1978); Alyeska Pipeline, 421 U.S. at 263. Congress has made no finding that Rule 11 serves this purpose. Nor, given the strategic context in which Rule 11 motions arise, is a private enforcement mechanism the most effective or appropriate manner in which to regulate the legal profession.

Fourth, if an appeal raises no issues of substance, the cost to the appellee in responding ought to be minimal,

and if the sanctions award is small, the appellee normally should be discouraged from incurring substantial attorneys' fees to defend it. This Court should not encourage the churning of attorneys' fees by creating an incentive to appellees to spend substantial time in responding to appeals in a non-cost-effective manner.[8/]

Fifth, the automatic fee-shifting rule created by the court of appeals below creates incentives only to bring Rule 11

8/ On the other hand, a party awarded a small Rule 11 sanction may have a strong incentive to protect that sanction if the party is frequently the target of an identifiable class of frivolous suits. In such cases, the long-term benefit to the party in establishing that a certain type of suit is frivolous outweighs the cash value of the sanction in the particular case, and there is no reason to lament the erosion of that cash value in the appeal. Presumably a party knows whether an investment of its resources in defending a sanction is worthwhile. Automatic fee shifting removes the appellee's responsibility for making such an evaluation and promotes waste.

motions. It promotes no caution in the sanction-seeking process. Under the rule announced below, a party that successfully defends a Rule 11 award is automatically entitled to appellate fees, as, apparently, is a party denied Rule 11 sanctions in the district court but that obtains a reversal in the court of appeals. Danik, Inc. v. Hartmarx Corp., 875 F.2d at 897 (citing Westmoreland v. CBS, Inc., 770 F.2d 1168, 1179 (D.C. Cir. 1985). But a party that is sanctioned by the district court and wins reversal on appeal, or a party not sanctioned by the district court that successfully defends the denial on appeal, is not entitled to appellate fees (unless, of course, the appeal is frivolous under Rule 38). While in the context of civil rights cases an unequal standard for the award of attorneys' fees is justified by "a policy that Congress considered of the highest priority," Christiansburg Garment,

434 U.S. at 418, no such high-priority policy has been articulated under Rule 11. Indeed, the articulation through the Federal Rules of Civil Procedure of policies favoring a particular class of litigants is contrary to the Rules Enabling Act, 28 U.S.C. § 2072(b) (rules "shall not abridge, enlarge or modify any substantive right"). Cf. Marek v. Chesny, 473 U.S. 1, 10 (1985) (fee shifting under Fed. R. Civ. P. 68 is "neutral, favoring neither plaintiffs nor defendants").

Finally, automatic fee shifting on appeal has a chilling effect on creative litigation. Rule 11 was not meant to "chill an attorney's enthusiasm or creativity in pursuing factual or legal theories." Fed. R. Civ. P. 11 (Advisory Committee Notes to 1983 Amendment). So long as liability for fees is judged by the frivolousness standard, an attorney can protect himself or herself by meeting the

reasonable inquiry requirement. But if appellate fees are automatically assessed solely on the "loser pays" principle, an attorney cannot avoid liability even where the appeal raises significant legal issues. This substantially increased strict liability exposure will chill both attorneys and their clients, who in some cases may end up paying the fees.

In sum, the problem identified and sought to be remedied by the court of appeals is inherent in the nature of Rule 11 litigation. It is obvious to anyone giving Rule 11 a moment's thought. Yet neither the 1983 revisers nor Congress has seen fit to remedy the problem, and for good reason. A remedy is neither wise nor necessary. All the relief needed is provided by Rule 38 and 28 U.S.C. § 1927. These provisions should not be ignored in favor of a specious interpretation of Rule 11 itself.

CONCLUSION

For all of the reasons stated above, the judgment of the United States Court of Appeals for the District of Columbia Circuit should be affirmed as to the original award of sanctions by the district court but reversed as to the additional award of attorneys' fees incurred on appeal.

Respectfully submitted,

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